

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 MICHAEL CROW,

9 Plaintiff,

10 v.

11 SUE BAUER, *et al.*,

12 Defendants.

No. C09-5782 RJB/KLS

ORDER TO AMEND OR SHOW CAUSE

13 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28
14 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in*
15 *forma pauperis*. On December 16, 2009, Plaintiff filed his proposed civil rights complaint. Dkt.
16

17 1. Upon review of Plaintiff's proposed complaint, the Court finds and orders as follows:

18 **I. DISCUSSION**

19 Under the Prison Litigation Reform Act of 1995, the Court is required to screen
20 complaints brought by prisoners seeking relief against a governmental entity or officer or
21 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint
22 or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that
23 fail to state a claim upon which relief may be granted, or that seek monetary relief from a
24 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See
25 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).
26

ORDER TO AMEND OR SHOW CAUSE- 1

1 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
2 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
3 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
5 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
6 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
7 to relief above the speculative level, on the assumption that all the allegations in the complaint
8 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)(citations omitted).
9 In other words, failure to present enough facts to state a claim for relief that is plausible on the
10 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

12 The court must construe the pleading in the light most favorable to plaintiff and resolve
13 all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Although
14 complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law,
15 unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the
16 court can liberally construe plaintiff’s complaint, it cannot supply an essential fact an inmate has
17 failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673
18 F.2d 266, 268 (9th Cir. 1982)).

20 Unless it is absolutely clear that amendment would be futile, however, a pro se litigant
21 must be given the opportunity to amend his complaint to correct any deficiencies. *Noll v.*
22 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

24 On the basis of these standards, Mr. Crow has failed to state a claim upon which relief
25 can be granted. Mr. Crow purports to sue a Cowlitz County prosecutor and two Longview Police
26 Officers, claiming that he is being falsely held in the Cowlitz County Jail for a crime he did not

1 commit. Dkt. 1, p. 3. Mr. Crow alleges that his confinement continues even though the guilty
2 party has written a letter to the judge, prosecutor and Mr. Crow's attorney, admitting his guilt
3 and stating that he deceived Mr. Crow into helping him. *Id.* Mr. Crow seeks immediate release
4 from prison, monetary compensation for emotional and mental distress, and the appointment of a
5 lawyer to help him litigate this matter. *Id.*, p. 4.

6
7 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the
8 defendant must be a person acting under color of state law, (2) and his conduct must have
9 deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of
10 the United States. *Paratt v. Taylor*, 451 U.S. 527, 535 (1981).

11 This action challenges the propriety of ongoing criminal proceedings in Cowlitz County
12 state court. Generally, federal courts will not intervene in a pending criminal proceeding absent
13 extraordinary circumstances where the danger of irreparable harm is both great and immediate.
14 See *Younger v. Harris*, 401 U.S. 37, 45-46 (1971); see also *Fort Belknap Indian Community v.*
15 *Mazurek*, 43 F.3d 428, 431 (9th Cir.1994), cert. denied, 116 S.Ct. 49 (1995) (abstention
16 appropriate if ongoing state judicial proceedings implicate important state interests and offer
17 adequate opportunity to litigate federal constitutional issues); *World Famous Drinking*
18 *Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987)(Younger abstention doctrine
19 applies when the following three conditions exist: (1) ongoing state judicial proceeding; (2)
20 implication of an important state interest in the proceeding; and (3) an adequate opportunity to
21 raise federal questions in the proceedings).

22
23
24 Only in the most unusual circumstances is a petitioner entitled to have the federal court
25 intervene by way of injunction or habeas corpus until after the jury comes in, judgment has been
26 appealed from and the case concluded in the state courts. *Drury v. Cox*, 457 F.2d 764, 764-65

1 (9th Cir.1972). See *Carden v. Montana*, 626 F.2d 82, 83 84 (9th Cir.), cert. denied, 449 U.S.
2 1014 (1980). Extraordinary circumstances exist where irreparable injury is both great and
3 immediate, for example where the state law is flagrantly and patently violative of express
4 constitutional prohibitions or where there is a showing of bad faith, harassment, or other unusual
5 circumstances that would call for equitable relief. *Younger*, 401 U.S. at 46, 53-54.

6
7 Here, the Plaintiff has not plead any extraordinary circumstances warranting intervention
8 by this Court in any ongoing state proceeding. He has also not plead any violation of rights
9 protected by the Constitution or federal statute. If Plaintiff wishes to proceed with a claim, he
10 must provide a short and plain statement indicating how he has suffered a violation of rights
11 protected by the Constitution or federal statute. He must further describe how such violation was
12 proximately caused by a person acting under color of state or federal law.

13
14 In addition, when a person confined by government is challenging the very fact or
15 duration of his physical imprisonment, and the relief he seeks will determine that he is or was
16 entitled to immediate release or a speedier release from that imprisonment, his sole federal
17 remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to
18 recover damages for an alleged unconstitutional conviction or imprisonment, or for other harm
19 caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983
20 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged
21 by executive order, declared invalid by a state tribunal authorized to make such determination, or
22 called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.
23 *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

24
25 In this case, Mr. Crow requests monetary compensation for his unlawful incarceration.
26 Dkt. 1, p. 4. As noted above, however, before a prisoner may sue to recover damages for an

1 alleged unconstitutional conviction or imprisonment, or for other harm caused by actions whose
2 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that
3 the conviction or sentence has been reversed on direct appeal, expunged by executive order,
4 declared invalid by a state tribunal authorized to make such determination, or called into
5 question by a federal court's issuance of a writ of habeas corpus.

6
7 The court notes further that Plaintiff purports to sue the Cowlitz County prosecutor, Sue
8 Bauer. Plaintiff is advised that a state prosecuting attorney who acts within the scope of his or
9 her duties in initiating and pursuing a criminal prosecution and presenting the State's case is
10 absolutely immune from a suit brought for damages under 42 U.S.C. § 1983, *Imbler v.*
11 *Pachtman*, 424 U.S. 409, 424, 427 (1976); *Ashelman v. Pope*, 793 F.2d 1072, 1076, 1078 (9th
12 Cir. 1986) (en banc), "insofar as that conduct is 'intimately associated with the judicial phase of
13 the criminal process,'" *Burns v. Reed*, 500 U.S. 478, 486 (1991)(quoting *Imbler*, 424 U.S. at
14 431). This is so even though the prosecutor has violated a plaintiff's constitutional rights, *Broam*
15 *v. Bogan*, 320 F.3d 1023, 1028-29 (9th Cir. 2003), or the prosecutor acts with malicious intent,
16 *Genzler v. Longanbach*, 410 F.3d 630, 637 (9th Cir.), cert. denied, 546 U.S. 1031, 126 S.Ct. 736,
17 546 U.S. 1031, 126 S.Ct. 737, 546 U.S. 1032, 126 S.Ct. 749 (2005); *Ashelman*, 793 F.2d at 1078.

18
19 Due to the deficiencies described above, the Court will not serve the complaint. Mr.
20 Crow may file an amended complaint curing, if possible, the above noted deficiencies, or show
21 cause explaining why this matter should not be dismissed no later than **February 26, 2010**. If
22 Mr. Crow chooses to file an amended complaint, which seeks relief cognizable under 42 U.S.C.
23 § 1983, his amended complaint shall consist of a short and plain statement showing that he is
24 entitled to relief, and he must allege with specificity the following:
25
26


- 1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights;
- 2) the dates on which the conduct of each defendant allegedly took place; and
- 3) the specific conduct or action Plaintiff alleges is unconstitutional.

Mr. Crow shall set forth his factual allegations in separately numbered paragraphs. The amended complaint shall operate as a complete substitute for (rather than a mere supplement to) the present complaint. Mr. Crow shall present his complaint on the form provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part of the original complaint by reference, and it must be clearly labeled the "First Amended Complaint" and Cause Number C09-5782 RJB/KLS must be written in the caption. Additionally, Plaintiff must submit a copy of the "First Amended Complaint" for service on each named Defendant.

If Mr. Crow decides to file an amended civil rights complaint in this action, he is cautioned that if the amended complaint is not timely filed or if he fails to adequately address the issues raised herein on or before **February 26, 2010**, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a "strike" under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three or more civil actions or appeals which are dismissed on grounds they are legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil action or appeal in forma pauperis "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

The Clerk is directed to send Mr. Crow the appropriate form for filing a 42 U.S.C. 1983 civil rights complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to Plaintiff.

DATED this 2nd day of February, 2010.


Karen L. Strombom
United States Magistrate Judge